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No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

INLAND-ROME, INC., formerly known
as GEORGIA KRAFT COMPANY,
Petitioner,

v.

C.L. RHODES, JR., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

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QUESTIONS PRESENTED

1. Can the appellate courts of Georgia refuse to apply the Federal Arbitration Act (the "FAA") and, contrary to the Supremacy Clause and numerous applicable precedents of this Court, decline to enforce an arbitration agreement in a 65-year, 6400 acre timber purchase contract between Georgia landowners and a multi-state paper and forest products manufacturer incorporated in Delaware, solely on the ground that the underlying contract does not call for shipments of the subject timber "across state lines" and, therefore, "does not affect interstate commerce"?

2. Whether the recently enacted 9 U.S.C. § 15 preempts contrary state law and prohibits state appellate courts from granting interlocutory appeals to review trial court orders compelling arbitration pursuant to the Federal Arbitration Act under circumstances where such appeals are prohibited by the federal statute?

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LIST OF PARTIES

The parties to this appeal are Inland-Rome, Inc.,* formerly known as Georgia Kraft Company, as Petitioner; and C.L. Rhodes, Jr., individually, and in his representative capacity as executor of the estate of C.L. Rhodes, deceased, and in his representative capacity as executor of the estate of Cleo K. Rhodes, deceased; Jane C. Rhodes; Susan Rhodes Harris; C.L. Rhodes, III; and Boyd C. Rhodes, as Respondents.

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* The companies to be listed in accordance with Sup. Ct. Rule 29.1 are Temple-Inland, Inc. and Inland Container Corporation I.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

Petitioner, Inland-Rome, Inc., formerly known as Georgia Kraft Company (hereinafter "Inland-Rome"), respectfully requests that a Writ of Certiorari issue to review the opinion of the Court of Appeals of the State of Georgia entered on March 5, 1990, reversing an order of the Superior Court of Greene County, Georgia, entered on March 7, 1989, which had granted Inland-Rome's motion to compel arbitration and to stay the proceeding under the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 3, 4.

OPINIONS BELOW

The Georgia Court of Appeals' opinion, entered on March 5, 1990, is reported at 195 Ga. App. 39, 392 S.E.2d 270. It is reprinted in the appendix hereto, pp. 1a-5a, *infra*.

The Georgia Court of Appeals' order granting respondents' application for an interlocutory appeal, entered on April 13, 1989, is reprinted in the appendix hereto, p. 6a, *infra*.

The order of the Superior Court of Greene County, Georgia (Parrott, J.), granting Inland-Rome's motion to

compel arbitration and to stay the proceeding, entered on March 7, 1989, is reprinted in the appendix hereto, pp. 7a-8a, *infra*.

The Greene County Superior Court's "Certificate for Immediate Review," entered on March 10, 1989, is reprinted in the appendix hereto, p. 9a, *infra*.

The Georgia Supreme Court's order dated May 2, 1990, denying Inland-Rome's petition for a writ of certiorari, is reprinted in the appendix hereto, p. 11a, *infra*.

JURISDICTION

On March 5, 1990, the Georgia Court of Appeals issued an opinion reversing the Greene County Superior Court's order compelling arbitration and staying the proceeding under the FAA, 9 U.S.C. §§ 3, 4. The Supreme Court of the State of Georgia denied Inland-Rome's petition for a writ of certiorari on the federal arbitration issue on May 2, 1990.

The jurisdiction of the Court to review the opinion of the Georgia Court of Appeals is invoked under 28 U.S.C. § 1257(a). Inland-Rome claims a right by virtue of the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, and the Supremacy Clause of the United States Constitution, to the judicial enforcement of its contractual right to arbitrate the disputes raised in this case, notwithstanding any state law to the contrary. It is therefore claiming a "right, privilege, or immunity . . . under the Constitution . . . or statutes of . . . the United States" within the meaning of 28 U.S.C. § 1257(a). Inland-Rome also claims that the FAA preempts Georgia's interlocutory appeal statute, O.C.G.A. § 5-6-34(b), as interpreted and applied in this case, and thus "the validity of a statute of . . . [a] State is drawn in question on the ground of its being repugnant to the Constitution . . . or laws of the United States" under 28 U.S.C. § 1257(a).

The Court has twice held that where an intermediate state appellate court has refused to enforce an arbitra-

tion agreement under the FAA, and the highest state appellate court denies discretionary review of that decision, the intermediate court's decision is a "[f]inal judgment[] or decree[] rendered by the highest court of a state in which a decision could be had" for purposes of 28 U.S.C. § 1257(a). *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520 (1987); *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 109 S.Ct. 1248 (1989). In *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852 (1984), another arbitration case, the Court held that the decision of a state court that finally decides a federal issue under the FAA is immediately appealable where " 'the party seeking review here might prevail [in the state court] on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action.' " *Id.* at 6, 104 S.Ct. at 856 (bracketed material in opinion) (quoting *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83, 95 S.Ct. 1029, 1039-40 (1975)). "For us to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state-court litigation has run its course," the Court explained, "would defeat the core purpose of a contract to arbitrate." *Southland Corp. v. Keating*, 465 U.S. at 7-8, 104 S.Ct. at 857.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the Commerce Clause, art. I, § 8, cl. 3, and the Supremacy Clause, art. VI, cl. 2, of the United States Constitution. The federal statutes involved are the Federal Arbitration Act, 9 U.S.C. §§ 1, 2, 3, 4 and 15, and 28 U.S.C. § 1292(b). The Georgia interlocutory appeal statute at issue is section 5-6-34(b) of the Official Code of Georgia Annotated. Because the constitutional provisions and statutes are lengthy, they are reproduced in the appendix, at pp. 12a-16a, *infra*.

STATEMENT OF THE CASE

This case involves a dispute over the interpretation of a 65-year commercial timber purchase contract between individual respondents resident in Georgia and petitioner Inland-Rome, a multi-state timber and paper company which manages 1.2 million acres of timberland and purchases three million "cords" of wood annually for its six mills located throughout the southeastern United States. (R. 4, 18, 604.) The 1957 contract and an accompanying lease cover 6400 acres owned by respondents. Inland-Rome entered into the contract with respondents "for the purpose of acquiring a sufficient amount of pine pulpwood to supply [its] forest products facilities." (R.604.)

Since 1957 Inland-Rome, a Delaware corporation, has paid the Georgia respondents the sum of $1,429,882 and has harvested approximately 111,200 "cords" of wood from respondents' lands pursuant to the contract. (R. 253-56, 391-409.) The timber harvested from respondents' lands was transported to Inland-Rome's Georgia mills and used to manufacture lumber products shipped to delivery points in many states around the country. (R. 603-05.) Prior to the Georgia Court of Appeals' surprising *sua sponte* holding, respondents had never contended that the subject contract did not involve interstate commerce.

Inland-Rome's contract payments to respondents were sent through the United States mail. (R. 34, 64.) The contract provided that Inland-Rome's annual payments to respondents would be adjusted based upon changes in the nationwide wholesale price index published by the United States Department of Labor. (R. 20-21.) The accounting records which the contract required Inland-Rome to maintain (R. 27) have been audited by accounting personnel from Texas employed by Inland-Rome's parent corporation, which is also a Delaware corporation. (R. 391-92.)

The parties expressly agreed in the contract that any dispute arising "at any time" concerning certain subjects requiring specialized knowledge of the forestry industry would be resolved not by litigation before a judge or jury, but through binding arbitration before a panel of forestry experts. (R. 27.) Respondents have filed a complaint alleging that Inland-Rome has breached the contract. The arbitration clause clearly applies to the technical forestry disputes raised in this case. Respondents now prefer a jury trial in their home county to such arbitration, and claim that the arbitration agreement is unenforceable under applicable Georgia law.

On October 26, 1988, after having demanded arbitration in its answer, Inland-Rome filed a motion to compel arbitration and to stay the proceeding pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 3, 4. Although respondents opposed Inland-Rome's arbitration motion on other grounds, they never argued that the contract did not evidence a transaction involving interstate commerce, or that the FAA did not apply to the contract. After conducting a hearing and considering briefs, the Superior Court of Greene County granted Inland-Rome's arbitration motion on March 7, 1989, necessarily finding that the contract evidenced a transaction involving interstate commerce, and issued a "Certificate for Immediate Review" permitting respondents to petition the Georgia Court of Appeals for an interlocutory review on March 10, 1989.

Inland-Rome opposed respondents' petition to the Georgia Court of Appeals for permission to pursue an interlocutory appeal of the trial court's arbitration order. Inland-Rome argued that the newly enacted appeals section of the FAA, 9 U.S.C. § 15, expressly prohibited an interlocutory appeal of an order granting a motion to compel arbitration under the FAA, except under narrow circumstances clearly not present here. Without any discussion, the Georgia Court of Appeals ignored Inland-Rome's argument and the federal decisions it cited and

granted respondents' application for an interlocutory appeal.

In an opinion dated March 5, 1990, the Georgia Court of Appeals reversed the Greene County Superior Court's order compelling arbitration and staying the action under the FAA. *Rhodes v. Inland-Rome, Inc.*, 195 Ga. App. 39, 392 S.E.2d 270 (1990). The opinion is reprinted in the appendix, pp. 1a-5a, *infra*. Disregarding controlling federal statutory and judicial authority, including decisions of this Court and of the United States Courts of Appeals which were brought to its attention, the Georgia Court of Appeals held the FAA applies only to contracts requiring by their terms the actual shipment of goods across state lines; that the contract in question did not expressly so require [1]; and that the federal statute consequently did not apply to the contract. *Id.* at 40, 392 S.E.2d at 271, appendix at p. 3a. This was the sole basis for the court's ruling on the federal arbitration issue. The Georgia court ignored all of the federal decisions under the FAA, and did not cite or distinguish any federal decisions in its opinion. The court then held that the arbitration agreement in the contract was unenforceable under Georgia's common law which refuses enforcement of arbitration agreements.

Thereafter, despite extensive briefing and citations to decisions relating to the applicability of the FAA and the Commerce Clause, the Georgia Court of Appeals denied Inland-Rome's motion for rehearing, and the Georgia Supreme Court denied Inland-Rome's petition for a writ of certiorari on the federal arbitration issue. Appendix at p. 11a. Inland-Rome then timely filed this petition.

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[1] Respondents have never disputed Inland-Rome's evidence that the contract did result in such interstate shipments (R. 603-05), and prior to the Georgia Court of Appeals' decision, they never argued that the FAA did not apply to the contract.

REASONS FOR GRANTING THE WRIT

I. IN REVERSING THE TRIAL COURT'S ORDER COMPELLING ARBITRATION AND HOLDING THAT THE FEDERAL ARBITRATION ACT (THE "FAA") DOES NOT APPLY TO THE CONTRACT AT ISSUE BECAUSE IT DOES NOT EXPRESSLY REQUIRE SHIPMENTS ACROSS STATE LINES, THE GEORGIA COURT OF APPEALS' OPINION IGNORES THE FAA AND THE SUPREMACY CLAUSE, DIMINISHES THE JURISDICTIONAL REACH OF THE COMMERCE CLAUSE, AND IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND OF THE UNITED STATES COURTS OF APPEALS.

Section 2 of the FAA, as federal substantive law, declares enforceable in all federal and state courts any arbitration provision "in any . . . contract evidencing a transaction involving commerce." 9 U.S.C. § 2. "Commerce," as used in the FAA, means interstate commerce. *See* U.S.C. § 1.

"Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941 (1983). The very purpose of the FAA is to overturn "the old common-law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements." *Southland Corp. v. Keating*, 465 U.S. 1, 14, 104 S.Ct. 852, 860 (1984).

This Court has commanded that "these [arbitration] agreements must be 'rigorously enforced.'" *Perry v. Thomas*, 482 U.S. 483, 490, 107 S.Ct. 2520, 2526 (1987)

(quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221, 105 S.Ct. 1238, 1242 (1985)). This Court has emphasized repeatedly that state courts are bound, under the Supremacy Clause of the United States Constitution, to apply the substantive provisions of the FAA to lawsuits pending in state court. *Perry v. Thomas*, 482 U.S. at 489-491, 107 S.Ct. at 2525-26; *Southland Corp. v. Keating*, 465 U.S. at 15-16, 104 S.Ct. at 859-60; *see also Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. at 25, 103 S.Ct. at 942.

Notwithstanding the FAA, many states, including Georgia, continue to be hostile to arbitration agreements and have erected numerous barriers under state law to judicial enforcement of these agreements. *See, e.g., Perry v. Thomas, supra* (holding that the FAA preempted a California statute which authorized employees to maintain a lawsuit for wages "without regard to the existence of any private agreement to arbitrate"); *Southland Corp. v. Keating, supra* (holding that the FAA preempted a California statute construed to require judicial consideration of claims brought under a franchise statute, notwithstanding the existence of an arbitration agreement); *Securities Industry Association v. Connolly*, 883 F.2d 1114 (1st Cir. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct 2559 (1990) (holding that the FAA preempted Massachusetts regulations "patently inhospitable to arbitration").

Here, the Georgia Court of Appeals has ignored the preemptive effect of the FAA on such hostile state common law. In direct contravention of this Court's decisions requiring state courts under the Supremacy Clause to enforce the FAA in lawsuits pending in state courts, the Georgia Court of Appeals has declared that it will not enforce the FAA unless the contract at issue provides for the actual shipment of goods across state lines:

> Clearly, the contract between [Inland-Rome] and [respondents] does not itself relate to the interstate

> shipment of any product. To the contrary, it relates solely to the sale of standing timber located exclusively in Georgia. . . . Under [Inland-Rome's] expansive construction of the scope of the Federal Arbitration Act, there would scarcely ever be occasion to apply state arbitration principles in a case involving a Georgia timber purchase contract since any timber that is sold and cut in Georgia can ultimately find its way, in some form or another, into another state. The Federal Arbitration Act obviously has not, as a matter of law, preempted application of state arbitration principles in each and every Georgia timber purchase contract case.

195 Ga. App. at 40, 392 S.E.2d at 271, appendix at p. 3a. The Georgia Court of Appeals made this statement but did not cite or distinguish any federal decisions anywhere in its opinion.

The Georgia Court of Appeals' opinion is directly contrary to prior decisions of this Court, which were brought to its attention but not acknowledged in its opinion. In *Perry v. Thomas, supra*, the Court held, in emphasizing "the preemptive effect of the Federal Arbitration Act" and reversing another state court's refusal to enforce an arbitration agreement under the FAA, that the "Federal Arbitration Act . . . embodies Congress' intent to provide for the enforcement of arbitration agreements *within the full reach of the Commerce Clause*." 482 U.S. at 490, 107 S.Ct. at 2526 (emphasis added).

This Court has specifically rejected the Georgia Court of Appeals' holding that the FAA applies only to contracts which involve the actual interstate shipment of a product. In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801 (1967), this Court expressly refused to limit the applicability of the FAA to " 'contracts between merchants for the interstate shipment of goods,' " an interpretation which the Court described as a "curious narrowing of the statute." *Id.* at 401 n.7, 87 S.Ct. at 1805 n.7. The Court quoted from the House Re-

port accompanying the FAA: " 'The control over interstate commerce . . . reaches not only the actual physical interstate shipment of goods *but also contracts relating to interstate commerce.*' " *Id.* (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924)) (emphasis added).

The Georgia Court of Appeals' opinion is contrary not only to this Court's decisions and the legislative history of the FAA, but also to the decisions of the United States Courts of Appeals. Their decisions have similarly emphasized that the scope of the FAA's coverage extends not merely to contracts for the interstate shipment of goods, but to the very limit of Congress' plenary authority to regulate interstate commerce under the Commerce Clause. *See Foster v. Turley*, 808 F.2d 38, 40 (10th Cir. 1986) ("The requirement that the underlying transaction involve commerce is to be broadly construed so as to be coextensive with congressional power to regulate under the Commerce Clause."); *Snyder v. Smith*, 736 F.2d 409, 417-18 (7th Cir. 1984), *cert. denied*, 469 U.S. 1037, 105 S.Ct. 513 (1984) ("Congress intended the FAA to apply to all contracts that it constitutionally could regulate."); *Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238, 243 (5th Cir. 1986) ("Commerce under the FAA is not limited to interstate shipment of goods, . . . but includes all contracts 'relating to interstate commerce.' ").

The undisputed record evidence in this case, summarized above, established beyond any doubt that the commercial timber purchase contract at issue affected interstate commerce sufficiently to satisfy the Commerce Clause and require enforcement of the FAA. The Georgia Court of Appeals' opinion is tantamount to a ruling that Congress is without constitutional authority under the Commerce Clause to regulate any aspect of the timber purchase contract at issue, regardless of whether the subject is arbitration, environmental regulation, civil rights, federal labor and employment laws, antitrust, or

any other field of federal regulation based upon the Commerce Clause.

This Court should issue a writ of certiorari in this case because the Georgia Court of Appeals' opinion is clearly erroneous and in direct conflict with this Court's decisions under the FAA. This is especially important because the Georgia Court of Appeals has deliberately disregarded this Court's decisions construing the FAA, cases which were brought to its attention but ignored in its opinion.

This Court should also issue a writ of certiorari because the uniform and consistent application of the FAA in state courts is crucial to the enforcement of voluntary arbitration agreements. A significant contraction of the scope of the FAA and of the Commerce Clause by a state appellate court in a published decision, unless corrected, will encourage other states hostile to mandatory arbitration to avoid the FAA in a similar fashion. Indeed, there is evidence that the state courts have already begun to recognize how best to avoid the requirements of the FAA without explicitly rejecting the statute or the state's Supremacy Clause obligations. *See, e.g., Ex parte Warren*, 548 So. 2d 157 (Ala. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 554 (1989) (White and Blackmun, J.J., would have granted certiorari) (holding that the FAA did not apply to a retail automobile purchase contract between an Alabama dealership and Alabama residents because the FAA applies only to contracts where the parties "contemplated substantial interstate activity")[2]; *accord, Ex parte Williams*, 555 So. 2d 146 (Ala.

[2] In *Ex parte Warren*, the contract at issue was a retail sales contract between Alabama consumers and an Alabama dealership for the purchase and sale of one automobile to be used solely for personal and not commercial purposes. Here, in contrast, the contract is a 65-year, 6400 acre commercial timber purchase contract between Georgia residents and a multi-state timber and paper company incorporated in Delaware, pursuant to which the corporation has paid

1989) (same; following *Ex parte Warren*); *see also Burke County Public Schools v. Shaver*, 303 N.C. 408, 279 S.E.2d 816 (1981) (adopting the same restrictive "contemplated substantial interstate activity" standard for applying the FAA).

Certiorari review is indispensable to full implementation of the FAA in state courts. The overwhelming majority of cases involving a petition to enforce arbitration agreements governed by the FAA are and will be brought in state courts under circumstances where the cases cannot be removed to federal district courts. As this Court has previously noted in another arbitration case, "the overwhelming proportion of all civil litigation in this country is in the state courts." *Southland Corp. v. Keating*, 465 U.S. at 15 & n.8, 104 S.Ct. 860 & n.8 ("It is estimated that 2% of all civil litigation in this country is in the federal courts."). Consequently, if the strong federal objectives and policies represented by the FAA are to be vindicated, the FAA must be enforced fully, consistently and uniformly at the state level. Only by means of certiorari review in appropriate cases can this Court ensure that these important federal policies are not eroded by the states in subtle ways, as in the Georgia Court of Appeals' decision here.

$1,429,882 and harvested 111,200 "cords" of wood. (R. 253-56, 391-409.) There is no dispute that the harvested timber has been used to manufacture lumber products shipped to delivery points in many states around the country. (R. 603-05.)

II. IN ACCEPTING AN INTERLOCUTORY APPEAL OF A TRIAL COURT'S ORDER COMPELLING ARBITRATION PURSUANT TO THE FAA, UNDER CIRCUMSTANCES WHERE AN INTERLOCUTORY APPEAL WOULD CLEARLY BE PROHIBITED BY THE FAA, THE GEORGIA COURT OF APPEALS ERRONEOUSLY CONCLUDED THAT THE NEW APPEALS SECTION OF THE FAA, 9 U.S.C. § 15, DOES NOT PREEMPT CONTRARY STATE LAW, AND THEREBY DECIDED WRONGLY AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, ADDRESSED BY THIS COURT.

"Congress' clear intent, in the [Federal] Arbitration Act, [was] to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. at 22, 103 S.Ct. at 940. This Court has declared that "[c]ontracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Southland Corp. v. Keating*, 465 U.S. at 7, 104 S.Ct. at 856. "[T]he unmistakably clear congressional purpose [was] that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. at 404, 87 S.Ct. at 1806.

A prohibition against immediate appeals of orders compelling arbitration under the FAA is absolutely necessary to protect and to further the substantive policies of the FAA. To permit one party to an arbitration agreement immediately to appeal a trial court's order compelling arbitration, before the arbitration is completed, defeats the very purpose of the FAA of "mov-

[ing] the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible."

> Arbitration is an expeditious and inexpensive mode of alternative dispute resolution. Allowing interlocutory appeals of such orders would defeat the attractiveness of arbitration by imposing delay and additional expense. . . . Immediate appealability would thus detract from the broad federal policy in favor of arbitration, emphasized repeatedly by the Supreme Court.

Zosky v. Boyer, 856 F.2d 554, 561-62 (3d Cir. 1988), *cert. denied*, —— U.S. ——, 109 S.Ct. 868 (1989).

On November 19, 1988, with knowledge that this Court had held the substantive provisions of the FAA were applicable in both federal and state courts, Congress amended the FAA to confirm that a prohibition against immediate appeals of orders compelling arbitration is an inseparable part of the FAA's substantive provisions. Newly enacted section 15 of the FAA, 9 U.S.C. § 15 (1988)[2], states in pertinent part:

> (b) except as otherwise provided in section 1292 (b) of title 28, an appeal may not be taken from an interlocutory order—
>
> (1) granting a stay of any action under section 3 of this title;
>
> (2) directing arbitration to proceed under section 4 of this title;
>
> (3) compelling arbitration under section 206 of this title; or
>
> (4) refusing to enjoin an arbitration that is subject to this title.

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[2] This amendment became effective on February 17, 1989, 90 days after enactment, and before the Greene County Superior Court's arbitration order. *See* Pub. L. 100-702, Title X, § 1019(a), Nov. 19, 1988, 102 Stat. 4670, 4671.

As a matter of federal law, a party may now pursue an appeal from an order compelling arbitration under the FAA *only* after the arbitration is completed, except under the narrow circumstances permitted by 28 U.S.C. § 1292(b). *See* 9 U.S.C. § 15(a)(1)(D) and (E). In contrast, an order denying a motion to compel arbitration or to stay the proceeding under the FAA is immediately appealable under 9 U.S.C. § 15(a)(1)(A) and (B).

In direct contravention of section 15 of the FAA and federal policy favoring "rapid and unobstructed enforcement of arbitration agreements," Georgia law strongly favors the immediate appeal of any order compelling arbitration, even under the FAA. In *Phillips Construction Co. v. Cowart Iron Works, Inc.*, 250 Ga. 488, 299 S.E.2d 538 (1983), the Georgia Supreme Court stated:

> Because of the unnecessary delay and expenses to the parties of an incorrect determination of whether judicial proceedings should be stayed pending arbitration, *we recommend that the trial courts, except in the clearest cases, certify* [for an immediate appeal pursuant to O.C.G.A. § 5-6-34(b), Georgia's interlocutory appeal statute] *orders granting or denying such stays.* Although our decision that orders granting or denying motions to stay judicial proceedings pending arbitration should be certified for interlocutory review except in the clearest cases runs counter to the principle that piecemeal appeals are to be avoided, we find that judicial economy favors interlocutory appeals in such cases.

Id. at 490, 299 S.E.2d at 540 (emphasis added). This admonition concerning immediate appeals of interlocutory orders under O.C.G.A. § 5-6-34(b) applies only to arbitration orders. In its opinion below, the Georgia Court of Appeals expressly stated that it granted respondents' application for an interlocutory appeal pursuant to the Georgia Supreme Court's command in *Phillips Construction Co. See* 195 Ga. App. at 40, 392 S.E.2d at 271, appendix at p. 2a.

This Court has repeatedly held that the FAA preempts any state law that actually conflicts with the FAA. In *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 109 S.Ct. 1248 (1989), another arbitration case arising out of a state court, this Court stated that "even when Congress has not completely displaced state regulation in an area [such as arbitration], state law may nonetheless be preempted to the extent that it actually conflicts with federal law—that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at ——, 109 S.Ct. at 1255 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 67 S.Ct. 399, 404 (1941)). The issue in determining whether the FAA preempts state law is whether the state law at issue "would undermine the goals and policies of the FAA." *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. at ——, 109 S.Ct. at 1255.

The FAA preempts O.C.G.A. § 5-6-34(b) to the extent that Georgia courts have interpreted and applied that statute in a discriminatory fashion to encourage interlocutory appeals of orders compelling arbitration under the FAA. As applied to Georgia state court orders compelling arbitration under the FAA, and as interpreted and applied by the Georgia Supreme Court in *Phillips Construction Co.*, Georgia's interlocutory appeal statute is in direct conflict with the policy objectives and technical requirements of the FAA. The enforcement of the Georgia statute in the manner required by the Georgia Supreme Court "would undermine the goals and policies of the FAA" of "mov[ing] the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible," and of promoting the "rapid and unobstructed enforcement of arbitration agreements."

Therefore, the Georgia Court of Appeals erred in relying on O.C.G.A. § 5-6-34(b) to permit review of an order compelling arbitration under the FAA. Nor can respond-

ents "cure" the error by arguing that the order meets the exceptional circumstacnes of 28 U.S.C. § 1292(b). The Greene County Superior Court did not find, nor did respondents ever argue or suggest, that the trial court's arbitration order "involves a controlling question of law as to which there is substantial ground for difference of opinion," as required by 28 U.S.C. § 1292(b).

The Court should issue a writ of certiorari because the FAA's prohibition against interlocutory appeals of orders compelling arbitration is a crucial provision supporting the FAA's substantive provisions. To permit state courts strongly to encourage interlocutory appeals of orders compelling arbitration under the FAA, as Georgia does here, defeats the purpose of the FAA. To hold that the substantive provisions of the FAA apply in state courts, but allow the states to apply their procedural provisions in a discriminatory manner to frustrate arbitration and to eliminate its attractiveness as an alternative dispute resolution mechanism, will allow the states effectively to nullify the FAA. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. at 24, 103 S.Ct. at 941 ("Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive *or procedural policies* to the contrary." (emphasis added).

The Court should also issue a writ of certiorari because this Court has not considered whether the newly enacted section 15 of the FAA may preempt or otherwise invalidate state procedural provisions that are used to thwart the substantive policies of the FAA. The Court has expressly reserved for future decision the issue whether the "procedural provisions" of the FAA apply in state court proceedings. *Volt Information Sciences v. Board of Trustees*, 489 U.S. at —— n.6, 109 S.Ct. at 1254 n.6; *Southland Corp. v. Keating*, 465 U.S. at 16 n.10, 104 S.Ct. at 861 n.10. The Court should accept this case so that it can make clear that, regardless of whether the procedural

provisions of the FAA technically apply in state court, an issue the Court need not decide, the states may *not* use their own procedural provisions to defeat the substantive policies of the FAA, at least not by allowing interlocutory appeals from orders compelling arbitration pursuant to the FAA under circumstances where such appeals are prohibited by the FAA.

CONCLUSION

For all the reasons stated, Inland-Rome's petition for a writ of certiorair should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

OPINIONS AND ORDERS

Opinion of the Court of Appeals
of the State of Georgia

IN THE COURT OF APPEALS
OF THE STATE OF GEORGIA

Case No. A89A1620

C.L. RHODES, JR., *et al.*,
Plaintiffs-Appellants,

v.

INLAND-ROME, INC., formerly known as
Georgia Kraft Company,
Defendant-Appellee.

Appeal from the Superior Court
of Greene County, Georgia
John Lee Parrott, Judge, Presiding

Filed: March 5, 1990

Before: CARLEY, Chief Judge, and
McMURRAY and BEASLEY, Judges.

In 1957, appellant-plaintiffs entered into a 65-year Timber Purchase Contract with appellee-defendant. In

1986, appellants notified appellee that they considered that the contract had been breached. Appellee responded by invoking the arbitration clause of the contract. Appellants then filed suit against appellee, seeking the following relief: the enjoining of cutting and removal of timber; the enjoining of any arbitration; a declaration that the contract was null and void; and, damages for breach of contract. Appellee answered, denying that the contract had been breached and asserting that appellants were required to arbitrate, and it also filed a counterclaim. The trial court granted a permanent injunction, finding that appellee's breach of the contract gave appellants the right to terminate it and that, under these circumstances, the arbitration clause of the contract did not apply. On appeal, the Supreme Court affirmed the trial court's grant of a permanent injunction. *Georgia Kraft Co. v. Rhodes*, 257 Ga. 469 (360 SE2d 595) (1987).

Thereafter, appellants amended their complaint to add additional claims against appellee. Appellee filed an amended answer, wherein it renewed its assertion that appellants were required to arbitrate. After a period of discovery, appellee moved for an order to compel arbitration and stay judicial proceedings and appellants moved for summary judgment as to appellee's counterclaims. The trial court granted appellee's motion and denied appellants' motion. The trial court certified for immediate review its order granting appellee's motion. Pursuant to *Phillips Constr. Co. v. Cowart Iron Works, Inc.*, 250 Ga. 488 (299 SE2d 538) (1983), we granted appellants' application for an interlocutory appeal from the trial court's order.

1. The motion to transfer this appeal to the Supreme Court is denied.

2. Appellee asserts that arbitration is mandated by the Federal Arbitration Act because the timber purchase contract involves interstate commerce. In support of this assertion, appellee cites evidence showing that the timber, once it has been cut, is removed for processing in certain

Georgia facilities and is subsequently shipped as lumber products to points throughout the country.

Clearly, the contract between appellee and appellants does not itself relate to the interstate shipment of any product. To the contrary, it relates solely to the sale of standing timber located exclusively in Georgia. Compare *Brockett Points Shopping Center, Inc. v. Development Contractors, Inc.*, —— Ga. App. —— (Case Number A89A1854, decided November 22, 1989). Appellee's evidence shows merely its own unilateral involvement in interstate commerce occurring only after its performance under the contract with appellants has long since been completed. Under appellee's expansive construction of the scope of the Federal Arbitration Act, there would scarcely ever be occasion to apply state arbitration principles in a case involving a Georgia timber purchase contract since any timber that is sold and cut in Georgia can ultimately find its way, in some form or another, into another state. The Federal Arbitration Act obviously has not, as a matter of law, preempted application of state arbitration principles in each and every Georgia timber purchase contract case. See generally *Pope v. Continental Augusta Woodlands, Inc.*, 169 Ga. App. 874 (315 SE2d 307) (1984). There being no evidence to authorize a finding of the applicability of the Federal Arbitration Act in the instant case, the trial court erred in finding that arbitration was mandated thereunder.

3. The Supreme Court has previously held that the clause in this contract would not be enforceable as a binding arbitration agreement under applicable state arbitration principles. "Georgia law has historically authorized agreements to binding arbitration of existing disputes. [Cit.] However, it appears that the contractual imposition of the duty to arbitrate as an exclusive and binding remedy for disputes which arise in the future is limited to construction contracts. [Cit.]" *Georgia Kraft Co. v. Rhodes*, supra at 472 (2). Since the clause provid-

ing for arbitration of future disputes in this nonconstruction contract would not otherwise be enforceable as an *exclusive and binding* arbitration provision, the only issue to be resolved is "whether the money claims are subject to arbitration as a *prerequisite to suit. . . .*" (Emphasis supplied.) *Georgia Kraft Co. v. Rhodes*, supra at 472 (2).

"[U]nder state law an arbitration provision that limits its applicability to questions such as the amount of loss or damage and requires arbitration as a condition precedent to a right of action upon the contract itself will be enforced. [Cits.]" *CCC Builders, Inc. v. City Council of Augusta*, 237 Ga. 589, 591 (229 SE2d 349) (1976). Even assuming that the instant arbitration clause is otherwise properly limited in its scope, it nevertheless fails to provide that arbitration shall only constitute a condition precedent to initiation of suit. "In an early case the Supreme Court held: 'It has often been held, that an agreement to refer matters in dispute, to arbitration, is not sufficient to oust the Courts of Law or Equity of their jurisdiction.' [Cit.] Unless the agreement provides that the parties shall arbitrate their differences as a condition precedent to a right to sue, a party may resort to the courts to settle a dispute. [Cits.]" *Millican Elec. Co., Inc. v. Fisher*, 102 Ga. App. 309, 311 (3) (116 SE2d 311) (1960). It follows that the instant arbitration clause is not enforceable as a condition precedent to appellants' initiation of suit on the contract, and that the trial court erred in granting appellee's motion to compel arbitration and stay the judicial proceedings.

4. Appellants enumerate as error the denial of their motion for summary judgment on appellee's counterclaims. Appellants' contention is that the decision of the Supreme Court in *Georgia Kraft Co. v. Rhodes*, supra, establishes their entitlement to judgment as a matter of law on appellee's counterclaim.

There is considerable doubt whether the Supreme Court's decision established the law of the case as to any

issue other than the validity of the grant of a permanent injunction on the evidence then before the trial court and whether it has any bearing whatsoever on the issues scheduled for trial before a jury. However, even accepting appellants' broad interpretation of the principle of the law of the case, their motion for summary judgment was nevertheless properly denied. At most, the Supreme Court's decision could be said to have established only appellants' right to terminate the contract based upon appellee's breach thereof. Appellee's counterclaims are in no way inconsistent with appellants' termination of the contract. To the contrary, appellee's counterclaims are predicated upon appellants' termination of the contract and seek a recovery for prepaid timber which was unharvested prior to that termination. "Recoupment and set-off lie for overpayments. . . ." *Wiseberg v. Novelty Hat Mfg. Co.*, 3 Ga. App. 362 (2) (59 SE 1112) (1908). The trial court correctly denied summary judgment in favor of appellants as to appellee's counterclaims.

5. The grant of appellee's motion to compel arbitration and stay judicial proceedings is reversed. The denial of appellants' motion for summary judgment is affirmed.

Judgment affirmed in part and reversed in part. McMurray, P. J., and Beasley, J., concur.

Order of the Court of Appeals
of the State of Georgia

IN THE COURT OF APPEALS
OF THE STATE OF GEORGIA

Application No. A89I0086

C.L. RHODES, JR., *et al.*,
Plaintiffs-Appellants,

v.

INLAND-ROME, INC., formerly known as
Georgia Kraft Company,
Defendant-Appellee.

Appeal from the Superior Court
of Greene County, Georgia
John Lee Parrott, Judge, Presiding

Filed: April 13, 1990

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

Upon consideration of the Application for an Interlocutory Appeal, it is ordered that it be hereby GRANTED. The Appellant may file a Notice of Appeal within 10 days of the date of this order. The Clerk of the Superior Court is directed to include a copy of this order in the record transmitted to the Court of Appeals.

/s/ _____
VICTORIA MCLAUGHLIN
Clerk, Court of Appeals
State of Georgia

Order of the Superior Court of
Greene County, Georgia
March 7, 1989

IN THE SUPERIOR COURT OF GREENE COUNTY
THE STATE OF GEORGIA

Civil Action No. 86-CV-160

C.L. RHODES, JR., *et al.*,
Plaintiffs,

v.

INLAND-ROME, INC., formerly known as
Georgia Kraft Company,
Defendant.

ORDER TO COMPEL ARBITRATION AND TO STAY THE PROCEEDING

The Defendant's Motion to Compel Arbitration And To Stay The Proceeding have been heard before the Court on December 6, 1988,

IT IS HEREBY ORDERED:

(a) that pursuant to § 4 of the Federal Arbitration Act, 9 U.S.C. § 4 (1982) the Plaintiffs and Defendant are compelled to arbitrate their claims that (1) the Defendant used poor forestry practices in managing their lands, (2) the Plaintiffs have suffered damages because of Defendant's change from a stick scaling or volumetric method to a weight scaling method of measuring cords of wood removed from their lands, and (3) the Defendant failed to maintain appropriate accounting records of Plaintiffs' cord credit account;

(b) that any dispute concerning the said three issues shall be resolved by three (3) arbitrators, including a forestry expert acting as chairperson, as provided in the Timber Purchase Contract between the parties;

(c) that pursuant to § 3 of the Federal Arbitration Act, 9 U.S.C. § 3 the instant action is stayed pending the arbitrators' findings on the above-stated issues;

(d) that the Court vacates any portion of the order dated December 8, 1986, that may be construed as precluding the arbitration of the three issues specified above; and

(e) that, as an exception to the above-stated stay of proceeding, each party shall be permitted to conduct discovery of the opposing party or parties' experts including without limitation the taking of depositions of the said experts.

SO ORDERED, this 7th day of March, 1989.

/s/ _____

JOHN LEE PARROTT
Judge, Superior Courts
Ocmulgee Judicial Circuit

Order of the Superior Court of
Greene County, Georgia
March 10, 1989

IN THE SUPERIOR COURT OF GREENE COUNTY
THE STATE OF GEORGIA

Civil Action No. 86-CV-160

C.L. RHODES, JR., *et al.*,
Plaintiffs,

v.

INLAND-ROME, INC., formerly known as
Georgia Kraft Company,
Defendant.

CERTIFICATE FOR IMMEDIATE REVIEW

At request of the plaintiffs the Court hereby certifies (pursuant to O.C.G.A. § 5-6-34(b)) that the Order of this Court signed March 7, 1989, entered March 9, 1989, to compel arbitration and stay this proceeding is of such importance to this case that immediate review should be had.

So ordered and certified this 10th day of March, 1989.

/s/ _____
JOHN LEE PARROTT, Judge
SUPERIOR COURTS OCMULGEE
JUDICIAL CIRCUIT

PRESENTED BY:

/s/ _____

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SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

Date: May 02, 1990

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Case No. S90C0939

INLAND-ROME, INC., f/k/a GEORGIA KRAFT COMPANY

v.

C. L. RHODES, JR., et al.

COURT OF APPEALS CASE NO. A89A1620

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Very truly yours,

/s/ Joline B. Williams
JOLINE B. WILLIAMS, Clerk

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 1, section 8, clause 3 of the United States Constitution states, in relevant part:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes; . . .

Article 6, clause 2 of the United States Constitution states, in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 1 of the Federal Arbitration Act (the "FAA"), as amended, 9 U.S.C. § 1, *et seq.*, states in pertinent part:

> . . . "[C]ommerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged in foreign or interstate commerce.

Section 2 of the FAA states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy there-

after arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3 of the FAA states:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Section 4 of the FAA states:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service therefor shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the mak-

ing of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Section 15 of the FAA states:

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

28 U.S.C. § 1292(b) provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court

> of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Section 5-6-34(b) of the Official Code of Georgia Annotated states, in relevant part:

> (b) Where the trial judge in rendering an order, decision, or judgment not otherwise subject to direct appeal, certifies within ten days of entry thereof that the order, decision, or judgment is of such importance to the case that immediate review should be had, the Supreme Court or the Court of Appeals may thereupon, in their respective discretions, permit an appeal to be taken from the order, decision, or judgment if application is made thereto within ten days after such certificate is granted. . . .

Supreme Court, U.S.
FILED
AUG 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-194

In The

Supreme Court of the United States

October Term, 1990

INLAND-ROME, INC., formerly known as GEORGIA KRAFT COMPANY,

Petitioner,

v.

C. L. RHODES, JR., et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

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No. 90-194

In The

Supreme Court of the United States

October Term, 1990

INLAND-ROME, INC., formerly known as GEORGIA KRAFT COMPANY,

Petitioner,

v.

C. L. RHODES, JR., et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

Respondents, C.L. Rhodes, Jr., et al.,[1] respectfully request that the Petition for Writ of Certiorari filed on behalf of Inland-Rome, Inc., formerly known as Georgia Kraft Company, be denied. Petitioner seeks to reverse the decision of the Court of Appeals of the State of Georgia

[1] Respondents, C. L. Rhodes, Jr., individually, and in his representative capacity as executor of the estate of C. L. Rhodes, deceased, and in his representative capacity as executor of the estate of Cleo K. Rhodes, deceased; Jane C. Rhodes; Susan Rhodes Harris; C. L. Rhodes, III; and Boyd C. Rhodes, are all residents of Georgia and collectively are referred to herein as "the Rhodes."

entered on March 5, 1990, finding there was no evidence to authorize the application of the Federal Arbitration Act. Respondents respectfully submit that the contract does not involve interstate commerce and that this Petition should be denied.

OPINIONS BELOW

The order of the Superior Court of Greene County, Georgia (Duke, J.) granting Rhodes' motion for injunctive relief, and terminating the contract, entered on December 12, 1986, is reprinted in the appendix hereto, pp. 1a-6a, *infra*. This decision was appealed to the Georgia Supreme Court which affirmed the judgment by its opinion of October 7, 1987.

The opinion of the Georgia Supreme Court entered on October 7, 1987, is reported at 257 Ga. 469, 360 S.E.2d 595 (1987). It is reprinted in the appendix hereto, pp. 7a-12a, *infra*.

OBJECTION TO JURISDICTION

The Petitioner seeks to base the jurisdiction of this Court on 28 U.S.C. 1257(a), contending that the judgment of the Court of Appeals of Georgia for which review is sought draws in question the validity of a State statute, to-wit: O.C.G.A. Section 5-6-34(b), and that the Federal Arbitration Act, 9 U.S.C. Section 1, et seq., preempts the State statute. That contention is not well-founded and overlooks the fact that such claim was not made by the

Petitioner when it filed its application for writ of certiorari with the Georgia Supreme Court seeking a review of the decision of the Georgia Court of Appeals for which review is sought here. Also, no cross-appeal was filed by the Petitioner when the trial court granted its certificate for immediate review under O.C.G.A. Section 5-6-34(b). The contention made by Petitioner in this Court as to 9 U.S.C. Section 15 preempting O.C.G.A. Section 5-6-34(b) was never presented to the Supreme Court of Georgia. The Petitioner's contention that it has a right under the Federal Arbitration Act, 9 U.S.C. Section 1, et seq., to enforce a contractual right to arbitrate the disputes in this case is misplaced. The very contract upon which Petitioner's contractual right to arbitrate is alleged to have arisen was terminated by order of the Superior Court of Greene County, Georgia, entered December 12, 1986, (Appendix, pp. 1a-6a, *infra*), by reason of Petitioner's breach thereof. That decision was appealed by Petitioner to the Supreme Court of Georgia where it was affirmed (*Georgia Kraft Company v. Rhodes*, 257 Ga. 469, 360 S.E.2d 595) (Appendix, pp. 7a-12a, *infra*), on October 7, 1987. No petition for certiorari was made to the United States Supreme Court from that decision. No claim of right under the Arbitration Act was made either in the trial court or in the Supreme Court of Georgia until approximately one year subsequent to the opinion of the Georgia Supreme Court and pursuant to the terms of the contract itself all rights and privileges thereunder had thus been terminated. Petitioner's own breach had terminated its alleged contractual rights. The record fails to show a claim of right under the Constitution or any statute of the United States specially set up by the Petitioner at the

proper time as required for jurisdictional predicate in this Court pursuant to 28 U.S.C. 1257(a). It has long been held that "if the right was not set up or claimed in the proper court below, the judgment of the highest court of the state in the action is conclusive so far as the right of review here is concerned." *Brooks v. Missouri*, 124 U.S. 394, 8 S.Ct. 443 (1888).

For the reasons stated above this case does not come within the purview of any of the jurisdictional considerations of Rule 17 of this Court.

STATEMENT OF THE CASE

This case involves a claim for damages arising out of Georgia Kraft's breach of a timber purchase contract and related lease agreement. Prior to the filing of the instant action, the Rhodes initiated suit in the United States District Court for the Southern District of Georgia, alleging jurisdiction in Federal Court on the basis of diversity of citizenship. Georgia Kraft objected to diversity jurisdiction, filing its motion to dismiss, contending that although it was a Delaware corporation, it did not maintain a place of doing business in Delaware; that the majority of its business was carried on in Georgia; that it maintained its principal office and place of business in Georgia; that all corporate records, all income tax records, all company asset records, and all corporate administrative and financial records were kept in Georgia; that, although it operated paper mills in Alabama, the Alabama mill had a production capacity of less than one-third of the combined capacity of the Georgia mills; and

that all corporate activities, including those carried on in the State of Alabama, reported to corporate headquarters in Georgia.[2]

Although Inland-Rome characterizes itself as "a multi-state timber and paper company" (Petition, p. 4), the original party to this litigation and to the contract was Georgia Kraft Company,[3] a corporation headquartered in Georgia, which processed the timber in Georgia, which made payments from its corporate headquarters in Georgia, and which maintained its records in Georgia. (Nix deposition, pp. 4, 29; Kinne deposition, pp. 26-27). Further, the "audit" of the records referred to by Petitioner (Petition, p. 4) was performed in June, 1988, after Inland-Rome had acquired Georgia Kraft Company, after the records had been obtained from Georgia (Sullivan deposition, p. 18), and after the contract had been terminated.

The agreement was prepared in Georgia, executed in Georgia, and specifically provided that the contract and

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[2] The affidavit of F. J. Reynolds filed in support of this motion, because of its length, has been reprinted in its entirety in the Appendix hereto, pp. 13a-17a, *infra*.

[3] Prior to January 1, 1988, Georgia Kraft Company was a corporation owned by Meade Corporation and Temple Industries. On or about January 1, 1988, fifty percent of the company was conveyed to the Meade Corporation, with the remainder of the assets still owned by Georgia Kraft Company which company merged into Temple Inland and Inland-Rome, Inc. was formed. (Kinne deposition, pp. 5-6). Since Georgia Kraft Company was the party to the contract in 1957 when it was executed and was the party who breached the contract and was initially named when this suit was filed in August, 1986, Petitioner will be referred to herein as Georgia Kraft Company.

was to be construed according to the laws of the State of Georgia (R-39).

On December 12, 1986, an order was entered on the Rhodes' prayer for injunctive relief granting a permanent injunction, enjoining Georgia Kraft "from hereafter exercising any rights or privileges of any kind or nature under said timber purchase contract or the related lease agreement." (R-172-178). Thereafter, on October 26, 1988, and on the eve of trial, Georgia Kraft filed a Motion to Compel Arbitration, raising for the first time the Federal Arbitration Act (R-532-534). 9 U.S.C. Section 1, et seq. Georgia Kraft also sought a stay of the civil action relying upon 9 U.S.C. Section 3. The Rhodes have steadfastly argued since the Federal Arbitration Act was first raised by Inland-Rome on October 26, 1988, more than two years after the inception of this litigation, that the Federal Arbitration Act did not apply. The Arbitration Act was not raised until subsequent to the order of the Superior Court of Greene County declaring that the Rhodes had effectively terminated the agreement and that there no longer existed any right of arbitration under the timber purchase agreement. The Georgia Supreme Court reviewed that decision and on October 7, 1987, issued its opinion agreeing that the arbitration provision did not control. *Id.* at 472, 360 S.E.2d at 598. Georgia Kraft did not seek any further review of that decision, deciding instead to continue with this litigation, conducting discovery and filing a motion for summary judgment which was denied.[4]

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[4] In addition to other arguments made in the trial court and the Georgia Court of Appeals, the Rhodes contended that

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Petitioner seeks a review by this Court of the sufficiency of the evidence to establish interstate commerce so as to invoke the provisions of the Federal Arbitration Act. The decision of the Georgia Court of Appeals finding that there was no evidence to authorize a finding of the applicability of the Federal Arbitration Act does not conflict with decisions of this Court or of the United States Courts of Appeal, and therefore the Writ of Certiorari should be denied.[5]

SUMMARY OF ARGUMENT

The Georgia Court of Appeals correctly applied Federal law in deciding that the contract did not evidence a transaction involving interstate commerce. Petitioner merely disputes the finding of that Court based upon the

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Georgia Kraft Company had waived its right to arbitration by actively pursuing discovery and litigating in the trial court for over two years prior to raising the Arbitration Act. The Court of Appeals, finding that the Arbitration Act was inapplicable, did not reach this issue.

[5] The Supreme Court of Georgia has accepted the Rhodes' petition for certiorari to review Division 4 of the opinion of the Georgia Court of Appeals, which affirmed the trial court's denial of summary judgment as to Georgia Kraft Company's counterclaims against the Rhodes. Georgia Kraft Company has never sought to have its counterclaims arbitrated. Oral argument in the Supreme Court on same is scheduled for September 5, 1990.

evidence that the Federal Arbitration Act was not applicable. Also, 9 U.S.C. Section 15 does not preempt Georgia's procedural rules and policy for interlocutory appeals of orders compelling arbitration.

ARGUMENT

I. THE CONTRACT DID NOT INVOLVE INTERSTATE COMMERCE.

The Federal Arbitration Act, 9 U.S.C. Section 1, et seq., applies in only two kinds of contracts, i. e., those in admiralty and those "evidencing a transaction involving commerce." 9 U.S.C. Section 2. Thus, the initial inquiry in any litigation concerning the application of the Arbitration Act is whether such a contract is involved. See *Prima Paint Corporation v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801 (1967).

Although Section 2 of the FAA has been declared to apply in state courts, this Court has recognized that the reach of the Arbitration Act would be limited to transactions involving interstate commerce and that the requirement contained in Section 2 of "involving commerce" was to be viewed "as a necessary qualification on a statute intended to apply in State and Federal Courts." *Southland Corporation v. Keating*, 465 U.S. 1, 13, 104 S.Ct. 852, 860 (1984). If it is determined that the Arbitration Act is applicable, the result is "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint, supra*, at 404, n. 12, 87 S.Ct. at 1806, n. 12; *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 109 S.Ct. 1248 (1989).

Thus, in order for the Arbitration Act to be applicable to this controversy, Petitioner had to show that the contract in question evidenced a transaction involving interstate commerce. The record in this case does not support such a finding, and the Georgia Court of Appeals correctly held that the Arbitration Act was, therefore, not applicable.

In determining whether or not this contract evidenced a transaction involving interstate commerce, the Georgia Court of Appeals correctly noted that the contract itself did not relate to the interstate shipment of any product, but related solely to the sale of standing timber located exclusively in Georgia. The Georgia Court of Appeals further noted that the evidence submitted by Petitioner showed only its "unilateral involvement in interstate commerce occurring only after its performance under the contract with [Respondents] has long since been completed." *Rhodes v. Inland-Rome, Inc.*, 195 Ga. App. 39, 40, 392 S.E.2d 270, 271.

Georgia Courts have consistently recognized the preemption of the Arbitration Act in transactions involving interstate commerce. For instance, in *ADC Construction Company v. McDaniel Grading, Inc.*, 177 Ga. App. 223, 338 S.E.2d 733 (1985), the Georgia Court of Appeals recognized that where transactions out of which the claim for arbitration arose involve interstate commerce within the meaning of the Arbitration Act, state law and policy must yield to federal law, and that the determination of whether a contract evidences transactions in interstate commerce is a question on which federal rules of contract construction and interpretation govern. *Id.* at 224, 338

S.E.2d at 735. Thus, the Georgia Court of Appeals in that case stated that:

> [a]lthough this construction was to be performed in Georgia and the general and subcontractor were both from Georgia, where the contractor uses employees from another state, and material incorporated into the construction is purchased in another state, and some of the subcontractors are from another state, these facts are sufficient to support a finding of the trial court that this contract involved "commerce" as that term is used in the Federal Arbitration Act.

Id. at 225, 338 S.E.2d at 736.

Likewise, in *Hilton Construction Company v. Barton Mechanical Contractors, Inc.*, 251 Ga. 701, 308 S.E.2d 830 (1983), the Georgia Supreme Court recognized that the Arbitration Act created a body of federal substantive law, to which state law and policy must yield where the transaction involved interstate commerce. *Id.* at 703, 308 S.E.2d at 832. See also *West Point-Pepperell, Inc. v. Multi-Line Industries, Inc.*, 231 Ga. 329, 201 S.E.2d 452 (1973); *Paine, Webber, Jackson & Curtis, Inc. v. McNeal*, 143 Ga. App. 579, 239 S.E.2d 401 (1977).

In *McCormick-Morgan, Inc. v. Whitehead Electric Company*, 179 Ga. App. 10, 345 S.E.2d 53 (1986), the Georgia Court of Appeals again affirmed the decision by the trial court that interstate commerce was involved and the Arbitration Act applied. The Court noted that:

> [w]here one contractor is not from Georgia and the contract is to be performed in Georgia, and material incorporated in the contract work is from out of state, as in the instant case, the

> contract is one involving interstate commerce within the meaning of 9 U.S.C. Section 1.

Id. at 12, 345 S.E.2d at 55.

With this background, the Georgia Court of Appeals in reviewing this contract noted that it related solely to the sale of standing timber located exclusively in Georgia, that it did not involve the interstate shipment of any product, and contrasted the facts of this case with those presented in *Brockett Pointe Shopping Center, Ltd. v. Development Contractors, Inc.*, 193 Ga. App. 854, 389 S.E.2d 374 (1989). The facts in *Brockett Pointe Shopping Center, Ltd.* showed undisputed evidence that out-of-state goods, services, materials and financing were supplied during execution of the construction contract, thereby showing that the transaction involved interstate commerce as contemplated by the Arbitration Act. *Id.* at 856, 389 S.E.2d at 375.

The test for determining whether or not a contract evidences a transaction involving interstate commerce has been stated in *Metro Industrial Painting Corp. v. Terminal Construction Co., Inc.*, 287 F.2d 382, at 387 (2nd Cir. 1961) (Lumbard, C.J., concurring), *cert. denied*, 368 U.S. 817, 82 S.Ct. 31 (1961), as follows:

> The significant question, therefore, is not whether, in carrying out the terms of the contract, the parties *did* cross state lines, but whether, at the time they entered into it and accepted the arbitration clause, they *contemplated* substantial interstate activity. Cogent evidence regarding their state of mind at the time would be the terms of the contract, . . . In addition, evidence as to how the parties expected the contract to be performed and how it was performed is relevant to whether substantial interstate activity was contemplated.

This standard has been applied by state courts to determine whether or not a contract involves interstate commerce so as to apply the Arbitration Act. In *Ex Parte Warren*, 548 So.2d 157 (Ala. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 554 (1989); *Ex Parte Williams*, 555 So.2d 146 (Ala. 1989); *Burke County Public Schools v. Shaver*, 303 N.C. 408, 279 S.E.2d 816 (1981).

In *Ex Parte Warren, supra*, a suit was filed alleging breach of contract and breach of warranties pursuant to the Magnuson-Moss Warranty – Federal Trade Commission Improvement Act, 15 U.S.C. Section 2301-12. The sales contract contained an arbitration clause specifically stating that the motor vehicle described had theretofore been traveling in interstate commerce and "has an impact upon interstate commerce." The contract further made specific reference to the Federal Arbitration Act, and the parties agreed to submit any dispute under the terms of the contract of sale to arbitration under the Arbitration Act. However, the facts showed that the plaintiffs were residents of Alabama; the defendant corporation, although a Delaware corporation, had its sole and principal place of business in Alabama; that the sale of the vehicle occurred within the State of Alabama; that the contract was entered into and executed in the State of Alabama; and that all obligations anticipated from the sales contract were to be performed solely within the State of Alabama. 548 So.2d at 159. Based upon the stipulated facts, the Alabama Supreme Court determined that the transaction did not involve interstate commerce as contemplated by the Arbitration Act.

In the instant action, the Rhodes are residents of Georgia; Georgia Kraft, although a Delaware corporation,

had its principal place of business in Georgia; the sale of the timber which is the subject of the contract occurred within Georgia; all of the land under the contract and related lease agreement was in Georgia; the contract for the sale of the timber was entered into and executed in the State of Georgia and provided that it was to be governed by the laws of the State of Georgia; and all obligations anticipated under the contract were to be performed solely within the State of Georgia. Thus, clearly at the time the Rhodes and Georgia Kraft entered into the contract containing the limited arbitration clause,[6] substantial interstate activity was not contemplated. The Federal Arbitration Act was not referenced in the contract. It was acknowledged that Georgia law would apply to the contract. Further, the contract is between individual sellers and a corporate purchaser located within Georgia, rather than a transaction between merchants of different states.[7]

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[6] Not all disputes were to be arbitrated under the terms of the contract. Although Petitioner has argued subsequent to raising the Arbitration Act that the issue of whether the change from stick scaling or volumetric method to a weight scaling method of measuring cords breached the contract is to be determined by arbitration, it had previously recognized that "[w]hether or not we used a weight factor instead of stick scaling, that's been resolved. The Supreme Court [*Georgia Kraft Company v. Rhodes, supra*] has ruled that that breached the contract." (Transcript, May 24, 1988, p. 27).

[7] Although as Justice Harlan stated in dissent in *Prima Paint Corporation v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, ___, 87 S.Ct. 1801, 1809 (1967), that the legislative history indicates the Arbitration Act "was to have a limited application to

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Petitioner quotes one factor applied by the Georgia Court of Appeals, i.e., that "the contract . . . does not itself relate to the interstate shipment of any product," arguing that Georgia courts require interstate shipment of goods to justify a finding of "commerce" within the meaning of the Arbitration Act. As previously noted, Georgia has not so construed the Arbitration Act. See *e.g.*, *ADC Construction Company v. McDaniel Grading, Inc.*, *supra*, (Arbitration Act applies where employees are from another state, material purchased in another state, and some contractors from another state); *McCormick-Morgan, Inc. v. Whitehead Electric Company*, *supra*, (Arbitration Act applies where material incorporated in contract work is from another state); *Paine, Webber, Jackson & Curtis, Inc. v. McNeal*, *supra*, (Arbitration Act applies involving purchase and sale of securities in national exchanges). Further, the opinion of the Georgia Court of Appeals cannot fairly be read to require interstate shipment of a product. As that Court noted, the contract "relates solely to the sale of standing timber located exclusively in Georgia" and that Georgia Kraft Company's "own unilateral involvement in interstate commerce [occurs] only after its performance under the contract with [Respondents] has long since been completed." *Rhodes v. Inland-Rome*, *id.* at 40, 392 S.E.2d at 271.

Georgia Kraft Company apparently did not view the Federal Arbitration Act to be applicable to this controversy since it failed to raise the Federal Arbitration Act

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contracts between merchants for the interstate shipment of goods," neither this Court nor the courts of Georgia have so limited the application of the Arbitration Act.

for over two years after this litigation had begun. Georgia Kraft Company had also taken the position in Federal Court that its activities were confined to the State of Georgia, rather than being multi-state, in arguing that the Federal action initiated based upon diversity should be dismissed.

This Court should not review by writ of certiorari the ruling by the Georgia Court of Appeals finding under the facts of this case that the contract did not evidence a transaction involving interstate commerce. The Georgia Supreme Court declined to review this issue by writ of certiorari. As evidenced by the argument presented herein, Georgia courts have consistently applied the Federal Arbitration Act in situations involving interstate commerce, and this decision of the Court of Appeals is consistent not only with the prior decisions of the Georgia Supreme Court and Court of Appeals, but is not in conflict with decisions of this Court or of the United States Courts of Appeal.

II. GEORGIA'S INTERLOCUTORY APPEAL STATUTE IS NOT PREEMPTED BY 9 U.S.C. SECTION 15.

Petitioner further seeks to have this Court expand the application of the Federal Arbitration Act beyond that currently authorized by this Court. For instance, as previously noted, this Court has not held that Sections 3 and 4 of the Arbitration Act are applicable to state court proceedings. *Volt Information Sciences v. Board of Trustees, supra* at ___ n. 6, 109 S.Ct. at 1254, n. 6. Petitioner seeks to

apply not only Section 2 to this intra-state transaction, but also Sections 3, 4, and 15 of the Act.

As noted in the objection to jurisdiction herein, Georgia Kraft Company did not cross-appeal from the trial court's order certifying its decision for immediate review and did not seek a review by the Supreme Court of Georgia of the decision granting the interlocutory appeal. Therefore, it did not preserve that ground after objecting to the application for interlocutory appeal filed by the Rhodes. Further, in the trial court, Georgia Kraft Company took a position contrary to that argued before this Court and did not argue to the trial court that Section 15 should be applied to preclude the certification for interlocutory appeal. At the hearing held in this matter on December 6, 1988, which was prior to the effective date of Section 15, counsel for Georgia Kraft stated:

> Finally, I make a practical observation, Your Honor, and that is that the Georgia Supreme Court has held in *Phillips Construction Company v. Cowart Iron Works*, [250 Ga. 488, 299 S.E.2d 538], a 1983 opinion, that in any case in which a Motion Seeking To Compel Arbitration is denied that the trial court is urged by the Georgia Supreme Court to certify that issue for appeal.

The order of the trial Court was not entered until March 9, 1989, and the certificate for immediate review as provided under O.C.G.A. Section 5-6-34(b) was signed on the following day, all subsequent to the effective date of Section 15 on February 17, 1989. No cross-appeal was filed by Georgia Kraft from the order certifying its decision for immediate review; this was not urged as error in the Court of Appeals subsequent to the grant of the application for interlocutory appeal, and no review of

this interlocutory order was sought in the Supreme Court of Georgia. Therefore, it is respectfully submitted that this Court does not have jurisdiction to review same and further that the granting of the interlocutory appeal is now moot.

Also, since the contract in issue does not involve interstate commerce, it is unnecessary for this Court to reach the issue of the application of newly enacted Section 15 of the Arbitration Act.

Further, as this Court held in *Volt Information Sciences, Inc. v. Board of Trustees, supra* at ___, 109 S.Ct. at 1254:

> There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to insure the enforceability, according to their terms, of private agreements to arbitrate.

Volt Information Sciences, supra, also noted that the Arbitration Act does not reflect an intent to occupy the entire field of arbitration. Therefore, the California statute in issue in that case staying arbitration pending a resolution of related litigation was upheld as not being preempted by the Arbitration Act, when it was provided that the contract was to be governed by the law of California. In this case, the contract specifically provided that it was to "be construed according to the laws of the State of Georgia." Therefore, the Georgia policy as stated in *Phillips Construction Co. v. Cowart Iron Works, Inc.*, 250 Ga. 488, 299 S.E.2d 538 (1983), recommending that the trial courts, "except in the clearest cases," certify orders granting or denying stays of arbitration on the basis "that judicial economy favors interlocutory appeals in such cases" (*id.*

at 490, 299 S.E.2d at 540) is valid and does not contravene federal policy.

This Court has specifically held that the provisions of Section 4 of the Arbitration Act, to the extent that they require application of the Federal Rules of Civil Procedure, are not binding upon state courts. *Southland Corporation v. Keating, supra,* at ___, n. 10 104 S.Ct. at 861, n. 10. Thus, although this Court has required the application of the Federal Arbitration Act in state courts under the commerce clause, it has left the procedures for state court proceedings to the states so long as they do not conflict with the federal policy of enforcing the agreement to arbitrate.

This Court is being asked to give an advisory ruling concerning the procedural provisions of the Federal Arbitration Act. This case is not a proper case for such a ruling since Petitioner has not sought a judicial review by the Georgia Supreme Court and since the contract in issue does not involve interstate commerce.

CONCLUSION

For all the reasons stated herein, Respondents respectfully request that the Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

ORDER OF SUPERIOR COURT OF
GREENE COUNTY, GEORGIA
ENTERED DECEMBER 12, 1987

IN THE SUPERIOR COURT OF GREENE COUNTY,
STATE OF GEORGIA.

C. L. RHODES, JR., et al.,	:	CIVIL ACTION
Plaintiffs	:	NO. 86-CV-160
v.	:	
GEORGIA KRAFT COMPANY,	:	
Defendant	:	

ORDER

I. STATEMENT OF THE CASE

The above-styled case comes before this Court on Plaintiffs' Motion for a Preliminary Injunction and Declaratory Judgment. A hearing in this matter was held September 9, 1986, in the Superior Court of Greene County, Greensboro, Georgia, at which time the parties, through counsel, presented arguments to the Court. The Court subsequently took the matter under advisement.

On January 1, 1957, certain of the plaintiffs as "Sellers" and the defendant as "Purchaser" entered into a timber purchase contract. Those same parties also entered into a lease agreement on June 1, 1957, regarding property owned by the plaintiffs on which the timber was located.

On August 15, 1986, plaintiffs in the above-styled case filed their complaint alleging certain breaches of the

contract by the defendant and seeking temporary injunctive relief.

After a hearing on August 19, 1986, on the issue of temporary injunctive relief, the Court issued its order, dated August 20, 1986, in which it temporarily enjoined the defendant from cutting or removing pulpwood or timber from the subject property.

At the hearing on September 9, 1986, the defendant argued that the matters in dispute between the parties are subject to arbitration under the terms of the timber purchase contract. The plaintiffs countered that (1) the defendant by its conduct waived any rights it had, if any, to arbitration; (2) that the dispute involved does not come within the arbitration provisions of the contract; and, (3) that the timber purchase contract has been effectively terminated, thereby terminating any rights to arbitration.

II. FINDINGS OF FACT

The Court makes the following findings of fact.

The plaintiffs and defendant entered into a timber purchase agreement with plaintiffs as sellers and defendant as buyer January 1, 1957, for purchase and sale of timber on approximately 6400 acres of land which is the property of the plaintiffs. Plaintiffs and defendant entered into a certain lease agreement dated June 1, 1957, with plaintiffs as lessors and defendant as lessee for the same property described in the aforesaid timber purchase agreement. The term of said lease agreement runs concurrently with the term of the said timber purchase contract, and under its terms "shall automatically terminate and

expire upon any sooner termination of said timber purchase contract or of the effective period thereof."

Paragraph 2 and paragraph 13 of the aforesaid timber purchase agreement require the defendant to keep permanent, accurate and detailed books and records with respect to the cord credit account as the same is more particularly described in paragraph 2 of said timber purchase agreement. Entries to said cord credit account by the defendant are required based upon the number of "cords", as that term is defined in paragraph 6 of said timber purchase agreement, of pulpwood cut and removed from the subject lands of the plaintiffs.

Under the terms of paragraph 5 of said timber purchase agreement, entries are required to be made by the defendant to plaintiffs' cord credit account for each cord of hardwood pulpwood as the equivalent of one-half of one cord of pine pulpwood; for each 1,000 board feet of pine or poplar saw timber, pole or piling timber, cross tie timber, or veneer block timber (as measured by Scribner Decimal C Scale) as the equivalent of three cords of pine pulpwood; for each 1,000 board feet of hardwood saw timber, pole or piling timber, cross tie timber, or veneer block timber, other than poplar (as measured by Scribner Decimal C Scale), as the equivalent of two cords of pine pulpwood.

The terms of paragraph 5 also provide that "should any of said timber be utilized by purchaser in a manner which renders impossible or impractical the computation of the quantity of timber utilized by means of the conversion factors set forth in said paragraph that in such event an additional conversion factor or factors for determining

the equivalent of cords of pine pulpwood so utilized shall be fixed by mutual agreement between the parties" and that in the event the parties are unable to agree upon such additional factor or factors, the same were to be determined in accordance with paragraph 12 of said agreement.

The defendant has no records showing the way and manner in which the cord credit account entries were determined at any time prior to 1981. The defendant has no records of any Scribner Decimal C Scale measurements on timber removed by it from plaintiffs' lands which are the subject of said timber purchase contract, and the defendant has not made any Scribner Decimal C Scale measurements on timber cut and removed from said lands since some time in the early 1960's.

Since sometime in the early 1960's, the defendant has weighed pulpwood removed from said lands in lieu of measuring same on the basis of 128 cubic feet equalling one cord, and has weighed saw timber removed from said lands without using Scribner Decimal C Scale measurements and in each instance has estimated the number of cords based on defendant's estimated weight equivalent. Plaintiffs have never agreed for the defendant to use defendant's estimated weight equivalent in lieu of actual cord and Scribner Decimal C Scale measurements, nor has defendant sought any such agreement from the plaintiffs. There are no amendments or modifications to the existing timber purchase agreement of January 1, 1957. The defendant has no weight tickets indicating weight of pulpwood or saw timber cut and removed from plaintiffs' lands prior to 1981.

Plaintiffs, through their counsel, notified the defendant July 15, 1986 that they deemed defendant's failure to maintain permanent records as to the cord credit account reflecting the actual number of cords removed as provided under paragraph 2 of the timber purchase agreement and the making of entries to the cord credit account based on weight rather than actual volume cord measurements as provided in the timber purchase agreement, and the failure to use Scribner Decimal C Scale measurements as provided in paragraph 5 of the timber purchase agreement, all to constitute a breach and default under the terms of said timber purchase agreement.

By letter of July 25, 1986, the defendant advised counsel for plaintiffs that it believed the use of cord weight equivalent was reasonable and common in the industry. Defendant also sought to invoke the arbitration provisions of said timber purchase agreement with respect to the alleged breaches of said contract by it. On July 31, 1986, plaintiffs, acting through their counsel, notified the defendant that in view of its failure to cure the breaches alleged that said timber purchase agreement and the related lease agreement were terminated in accordance with the provisions of said timber purchase contract. The aforesaid timber purchase contract in paragraph 18 provides that should purchaser, Georgia Kraft Company (the defendant), default in its convenants, obligations, or liabilities under said agreement, and should said default continue and not be removed or corrected within a reasonable time after delivery of service of written notice thereof, sellers (plaintiffs herein) may, at their option, during the continuance of said default, terminate said agreement in its entirety.

III. CONCLUSIONS OF LAW

Based on the foregoing findings of fact, this Court concludes that the defendant has breached the timber purchase contract with plaintiffs. The plaintiffs have effectively terminated this agreement in its entirety in accordance with the provisions of paragraph 18 of said agreement. There no longer exists any right of arbitration under the timber purchase agreement, the same having been terminated by plaintiffs as a result of the breaches by defendant. Therefore, the defendant is properly before this Court, and venue and jurisdiction in this case are proper. The sole issues remaining for determination in this case are plaintiffs' claim for damages against the defendant and defendant's counterclaim for damages against plaintiffs.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that the temporary restraining order entered by this Court on August 20, 1986, be, and the same is hereby, made permanent and defendant is permanently enjoined from hereafter exercising any rights or privileges of any kind or nature under said timber purchase contract or the related lease agreement.

SO ORDERED, this 8th day of December, 1986.

/s/ Joseph B. Duke
Joseph B. Duke
Judge, Superior Courts
Ocmulgee Judicial Circuit

OPINION OF SUPREME COURT OF GEORGIA DECIDED OCTOBER 7, 1987

In the Supreme Court of Georgia

Decided: OCT 7 1987

44406. GEORGIA KRAFT COMPANY v. RHODES, et al.

CLARKE, Presiding Justice.

This is an appeal from a permanent injunction entered against Georgia Kraft; the controlling issues are the construction to be given to the terms of a timber purchase contract (hereinafter Contract) and a lease agreement (hereinafter Lease) entered into between Georgia Kraft and the predecessors in title to the appellees (hereinafter the Rhodes). After two hearings the trial court concluded that Georgia Kraft had breached the Contract which allowed the Rhodes to exercise their right to terminate the agreements.

On January 1, 1957, the Rhodes as sellers entered into the Contract with Georgia Kraft for the purchase and sale of timber on 6400 acres of land; on June 1, 1957 they entered into the Lease of the same lands to run concurrently with the Contract and providing further that the Lease would terminate upon termination for any reason of the Contract.

The Contract provided that Georgia Kraft have the right to cut one cord of wood per acre per year and would pay the Rhodes the contract pricing for these cords whether or not they were cut in a given year. The Contract also establishes a "Cord Credit Account" and provides that when Georgia Kraft fails to harvest its one cord

per acre in a year then there will be an account balance entitling Georgia Kraft to cut unharvested trees which were paid for at any time during the duration of the Contract.

The Contract requires that Georgia Kraft maintain a permanent record on the cord credit account regarding the amounts cut and paid for under the contract. The Contract provides in paragraph 5 that the Scribner Decimal C Scale will be used in determining a cord by volume and sets forth conversion factors for determining entries into the cord credit account.

According to the Rhodes, they learned in April of 1986 that Georgia Kraft had abandoned the cord-volume measurement and had been using a weight measurement and then later learned that Georgia Kraft had not maintained a permanent record of the cord-credit account. After some communications between the parties the Rhodes notified Georgia Kraft that they considered the contract breached by Georgia Kraft. Georgia Kraft responded with a call for arbitration under a clause of the Contract.

The Rhodes then filed this action seeking to enjoin Georgia Kraft from cutting or removing timber under the contract and to declare the contract null and void. They also sought to enjoin any arbitration and to recover damages. Georgia Kraft denied any breach and contended that the Contract required the Rhodes to arbitrate. They also filed a counterclaim to recover the value of the wood paid for under the cord-credit account but not yet harvested. A hearing was held on August 19, 1986 on the Rhodes request for a temporary restraining order; both

sides were represented and the court granted the temporary relief and set an interlocutory hearing.

The second hearing took place on September 9, 1986; at the conclusion it was agreed that the August 19 order remain in effect until further order of the court. On December 8, 1986 the court entered an order concluding that Georgia Kraft had breached the Contract which gave the Rhodes the right to declare it voided. Under these circumstances the court held that the arbitration provision of the Contract did not apply and the sole remaining issues were the claims and counterclaim for damages. It was ordered that the temporary injunction be made permanent.

1. The appellants contend that the trial court erred in entering a permanent injunction after the interlocutory hearing because there was no order consolidating the issues as provided in OCGA §9-11-65(a)(2). The general rule is that entering permanent relief after an interlocutory hearing is improper. *Ward v. Process Control Corp.*, 247 Ga. 582 (277 SE2d 671) (1981); *Miller v. Wells*, 235 Ga. 411 (219 SE2d 729) (1975). However, when there is notice of an interlocutory injunction hearing, the court may determine the issues on their merits after the interlocutory hearing where there is no objection or where the parties have acquiesced. *Richmond County Hosp. Auth. v. Richmond County*, 255 Ga. 183 (4) (336 SE2d 562) (1985); *Wilkerson v. Chattahoochee Parks, Inc.*, 244 Ga. 472 (260 SE2d 867) (1979).

At the conclusion of the interlocutory hearing the trial court and counsel for each side discussed the issues then pending before the court. The court did inform

counsel that he might rule on whether the contract had been breached as a matter of law based upon the evidence before him. *Regency Club v. Stuckey,* 253 Ga. 583 (3) (324 SE2d 166) (1984). Under the circumstance we find no procedural error in the court entering a ruling on the merits of whether the contract was breached.

2. Appellants next contend that the court erred in ruling on the merits of whether the contract had been breached because there was insufficient evidence before the court, and erred in failing to enforce the arbitration clause. There was no witness testimony at the hearing. There were two affidavits in the record from the plaintiffs and the defendants had brought in documents in response to a motion to produce. The documents were discussed and a stipulation was made regarding which documents were kept up and in the possession of Georgia Kraft, although no stipulation was made as to the legal effect of those documents.

The stipulations and submissions of counsel were sufficient to allow the court to construe the Contract. The Contract provides that measurements be made by the Scribner Decimal C Scale and cubic feet. Sometime in the 1960s Georgia Kraft switched to measuring the wood taken by weight and with no reference to the Scribner Decimal C Scale. The Contract provides that if the method of measuring provided in the Contract is no longer possible or practical, then a new method shall be set by agreement of the parties. It also provides that if the parties are unable to agree then the method would be decided by paragraph 12 of the Contract regarding arbitration.

The arbitration clause in paragraph 12 provides for the selection of arbitrators if there is a dispute over forestry practices or the method to be used in determining payment under the contract.

The court also had before it the fact that the Contract provides that Georgia Kraft agreed to keep permanent and detailed accounts with respect to the cord-credit account. There was no agreement by the Rhodes when Georgia Kraft changed the method of calculating payment sometime in the 1960s. Georgia Kraft has no record of how the cord credit account entries were determined prior to 1981 and has no weight tickets reflecting the amount of timber harvested prior to 1981.

The Contract provides that if Georgia Kraft defaults under any of its obligation and the default is not corrected after notice from the Rhodes then the Rhodes may terminate the Contract.

The Rhodes gave written notice alleging default under the Contract on July 15, 1986 based upon the failure to maintain permanent records of the cord-credit account and the unilateral change of calculating the method of payment. Georgia Kraft responded by invoking the arbitration clause. The trial court concluded that Georgia Kraft had breached the Contract by failing to keep permanent records and in unilaterally changing payment computations with no notice to the sellers, the Rhodes. The construction, interpretation and legal effect of a contract is a question for the court to decide. *Honea v. Gilbert*, 236 Ga. 218 (223 SE2d 218) (1976); *Holt v. Clairmont Development Co., Inc.*, 222 Ga. 598 (151 SE2d 151) (1966).

Kraft argues that this is a dispute over method of payment and the payment calculation section states that this is an issue for arbitration. Rhodes points out that the Contract provides for arbitration of payment method when a change in the method is proposed and not when a unilateral change is made without notice. Rhodes also points out that the arbitration provision in this contract is not a prerequisite to suit on all issues. This action is based upon breach of the contract by failing to use the method of calculation as provided in the Contract and failing to follow the terms regarding a change in the method of calculation. We agree that the arbitration provision does not control. We note that Georgia law has historically authorized agreements to binding arbitration of existing disputes. OCGA § 9-9-1, et seq. However, it appears that the contractual imposition of the duty to arbitrate as an exclusive and binding remedy for disputes which arise in the future is limited to construction contracts. OCGA § 9-9-80, et seq.

The trial court has found a breach of the Contract and entered a permanent injunction respecting harvesting of trees. The issues of money claims for each side have been reserved for trial. The question of whether the money claims are subject to arbitration as a prerequisite to suit is not before the court at this time. Under the circumstances of this case the trial court did not err in interpreting the contract and in concluding that under its terms the breach by Georgia Kraft entitled the Rhodes to terminate the Contract.

Judgment affirmed. All the Justices concur.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

C. L. RHODES, JR., INDIVIDUALLY, AND IN HIS REPRESENTATIVE CAPACITY AS EXECUTOR OF THE ESTATE OF C. L. RHODES, DECEASED, AND IN HIS REPRESENTATIVE CAPACITY AS EXECUTOR OF THE ESTATE OF CLEO K. RHODES, DECEASED; JANE C. RHODES; SUSAN RHODES HARRIS; C.L. RHODES, III; AND BOYD C. RHODES,	:	CIVIL ACTION NO. CV 186-145
Plaintiffs,	:	
vs.	:	
GEORGIA KRAFT COMPANY,	:	
Defendant.	:	

AFFIDAVIT OF
F. J. REYNOLDS

GEORGIA, FLOYD COUNTY.

Personally appeared before the undersigned officer, duly authorized to administer oaths, F. J. REYNOLDS, who, being first duly sworn, deposes and states on oath as follows:

1.

My name is F. J. REYNOLDS. I am 50 years old and a resident of Floyd County, Georgia. I am an employee and officer of Georgia Kraft Company, a Delaware corporation. From and since July, 1980, I have served as an officer

of and as Controller of Georgia Kraft Company. From and since April 30, 1986, I have also served as Assistant Secretary of Georgia Kraft Company. My duties in these offices include:

(a) By authority of the Board of Directors, I am empowered to attest to signatures and acts of officers of Georgia Kraft Company;

(b) I am responsible for the day-to-day financial and administrative functions of Georgia Kraft Company, including accounting, cash management and insurance coordination; and

(c) I have custody of the corporate seal as well as copies of corporate documents including the Articles of Incorporation and minutes of the meetings of the Board of Directors.

As such, I have personal knowledge of the corporate organization and existence of Georgia Kraft Company, and I am competent to make this affidavit.

2.

Georgia Kraft Company is a Delaware corporation, incorporated June 7, 1951. Georgia Kraft Company maintains an agent in Delaware, but does not maintain a place of doing business in Delaware. Georgia Kraft Company qualified to do business in Georgia on June 25, 1951 and has, since that date, remained duly qualified to do business in Georgia. Georgia Kraft Company qualified to do business in Alabama on April 23, 1956 and has, since that date, remained duly qualified to do business in Alabama. The majority of Georgia Kraft Company's business is carried on in Georgia.

3.

At all times pertinent to the above-styled action (from and since July, 1980, when I became an officer of and Controller of Georgia Kraft Company and prior thereto), Georgia Kraft has maintained its principal office and place of business in Rome, Floyd County, Georgia. All corporate records, all income tax records, all company asset records and all corporate administrative and financial records are kept in corporate headquarters in Rome, Georgia. The Chief Executive Officer of Georgia Kraft Company who is in charge of all the company's manufacturing operations both in the State of Georgia and in the State of Alabama has his office in Corporate Headquarters in Rome, Georgia and resides at Rome, Georgia. Georgia Kraft Company's Vice President, Human Resources, who is in charge of all personnel matters both in the State of Georgia and in the State of Alabama has his office in Corporate Headquarters in Rome, Georgia and resides at Rome, Georgia. The company's Controller, the Affiant, has his office in Corporate Headquarters at Rome, Georgia and resides at Rome, Georgia.

4.

At all times pertinent to the above-styled action (from and since July, 1980, when I became an officer of and Controller of Georgia Kraft Company and prior thereto), Georgia Kraft Company has operated paper mills in Floyd County, Georgia, Bibb County, Georgia and Russell County, Alabama. (The Alabama mill has a production capacity of less then one-third of the combined

capacity of the Georgia mills). Further, at all times pertinent to the above-styled action (from and since July, 1980, when I became an officer of and Controller of Georgia Kraft Company and prior thereto), Georgia Kraft Company has operated sawmills in Floyd County, Georgia, Meriwether County, Georgia, and Russell County, Alabama (each having equal capacity), and a plywood sawmill in Morgan County, Georgia. A large majority of Georgia Kraft Company's employees are employed in the State of Georgia.

5.

Although Georgia Kraft Company's operations in Alabama are sometimes referred to as "Alabama Kraft Co., a Division of Georgia Kraft Co.", this is not and never has been a separate corporation. "Alabama Kraft Co." is not and never has been a corporation. "Alabama Kraft Company" is not and never has been a corporation. At all times pertinent to the above-styled action (from and since July, 1980, when I became an officer of and Controller of Georgia Kraft Company and prior thereto), Georgia Kraft Company has used, and continues to use, "Alabama Kraft Company" simply as a trade name. All corporate activities in Alabama report to Corporate Headquarters in Rome, Georgia. All payroll checks for Alabama employees as well as all bills incurred in Alabama operations including payments for wood purchased in Alabama are paid with checks drawn from corporate headquarters in Rome, Georgia.

6.

I make this Affidavit of my own personal knowledge with the intent that it be used for any and all purposes in the case above-styled.

This 7th day of August, 1986.

Sworn to and subscribed before me this 7th day of August, 1986.

/s/ Bettie S. Daniel
NOTARY PUBLIC,
STATE OF GEORGIA

/s/ F. J. Reynolds
F. J. REYNOLDS

My commission expires MY COMMISSION EXPIRES SEPT. 22, 1989